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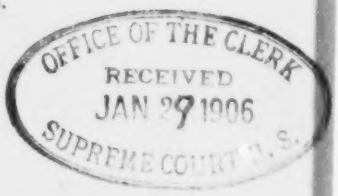
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.



No. 123.

KNOXVILLE WATER COMPANY, APPELLANT,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE ET AL.

PETITION FOR A REHEARING.

SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR.,
Solicitors for Appellants and Petitioners.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20039

(19,533.)

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THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE ET AL., APPELLEES.

PETITION FOR A REHEARING.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court:

Now comes the appellant, Knoxville Water Company, and, respectfully showing that it is aggrieved by the opinion and judgment of this court filed and entered herein, petitions this honorable court for a rehearing of this cause, or for a modification of said opinion and judgment, for the following reasons:

FIRST.

The court, we respectfully submit, failed to distinguish the manifest object and purpose of the contract of July 1, 1882 (Rec., pp. 34-40), and the respective rights and obliga-

tions of appellant and appellee City of Knoxville thereunder, from an ordinary statute creating a corporation, or a statute or ordinance merely granting a franchise or license to carry on a particular business, and erroneously applied to a solemn contract, entered into within the powers of both parties, those principles or canons of construction governing the interpretation of doubtful grants of public property, or of those powers and functions necessary for the accomplishment of the ends of government.

SECOND.

In construing the contract of July 1, 1882 (Rec., pp. 34-40), the court only discussed or, may we respectfully submit, considered (opinion, pp. 7-8) that provision of the contract whereby the city covenanted (Rec., p. 27) "not to grant to any other person or corporation any contract, or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the public streets, lanes or alleys or other public grounds, for the purpose of furnishing said city or its inhabitants with water, for the full period of thirty years from the first day of August, 1883," and erroneously construing the averments of the bill, particularly the first and fourth paragraphs thereof, failed to give effect not only to the situation of the parties at the time the contract was entered into, but also those express provisions of the contract which could mean nothing else than that appellant should furnish to appellee city and its inhabitants, and that they would take from appellant, all the water required by them for fire protection, public sanitary and domestic purposes during the full period of thirty years, unless sooner the city should purchase the plant of appellant.

In support whereof we, among other matters hereinafter referred to, submit:

1st. The charter of the Knoxville Water Company was not granted in 1877, as stated on the first page of the opinion, but in 1882 (Rec., p. 31), as shown in Exhibit No. 1, referred to in the first paragraph of the bill and set out in the record between pages 28 and 31. (See certificate Secretary of State, Rec., p. 31.)

Therefore, whatever inference the court may have drawn from its misconstruction or misunderstanding in respect of the date on which the charter of appellant was granted, to the effect that it had been carrying on its business in Knoxville for some time prior to the execution of the contract of July 1, 1882, is not warranted by the fact; and, moreover, the bill specifically avers that the plant and property of appellant were built under said contract of July 1, 1882.

2d. The abandonment by the city of its plan to build its own plant, which had been actually begun, did not occur, as the court seems to have found (opinion, p. 8), prior to and independent of the contract of July 1, 1882, but was only consummated as an integral part of that contract—in fact, the efforts of the city toward establishing a municipal plant became merged into said contract—by which appellee city secured the completion of the work commenced by it according to its own plans and specifications, coupled with provisions to enable it to secure the plant at a fair valuation, and rendering it impossible for appellant to sell to any other corporation, company, or individual (Rec., pp. 4, 5, 34, 39).

3d. The Water Company was required not only to build a system of "water works for the City of Knoxville" of capacity sufficient (Rec., p. 34) to supply said city with water for every purpose to which a municipal plant could be devoted, viz., "fire protection, public sanitary and domestic purposes," but to maintain said plant in such condition as would be sufficient and necessary to answer all of said purposes for the full period of thirty years, unless the city should become the owner of the same under its reserved right of purchase; and in this connection it is important to bear in mind, as throwing light upon the intention of the parties at the time, and showing the merger of the plans and efforts of the city into the contract of July 1, 1882, and that in fact the plant built thereunder was to all intents and purposes a municipal plant, the Water Company was required to take and use in and as a part of said plant, the particular property which the city had purchased for pumping station and reservoir sites (Rec., pp. 4, 5, 34).

THIRD.

The court should have treated the contract of July 1, 1882, as a valid and continuing agreement made by the city in virtue of its business powers, whereby it secured for itself during a limited period a continuing and certain supply of a commodity necessary, not only to its inhabitants, but to itself, for fire protection and sanitary purposes.

By said contract the city merely purchased water as it would purchase coal or sewer pipe, and thereby it did not "diminish its power of accomplishing the ends of its creation," but fulfilled those ends, and without divesting itself of any governmental function, purchased a necessary and

useful commodity for itself and inhabitants, the price of which at all times it may control, within reasonable limits, under the very charter of appellant Water Company.

FOURTH.

Appellant is either entitled to restrain appellee city from building an independent competing plant, or to compensation for the result of such independent and competitive plant, which, in the very nature of things, will result in the "taking" and destruction of appellant's plant and business. These principles are enunciated and enforced both by this court and the supreme court of Tennessee in the Walla Walla case (172 U. S., 1) and Red River Bridge Co. *vs.* Clarksville, 1st Sneed (Tenn.), 176, where contracts were enforced and protected without regard to their exclusive character.

FIFTH.

If the court should be of the opinion that appellant is not entitled to the relief sought by it in the courts of the United States, then, for reasons set out in the brief made a part of this petition, the bill should be dismissed without prejudice.

Further, your petitioner prays:

1st. That an order may be made for rehearing of the arguments in this cause on a day to be appointed by the court, at such time and upon such points as the court may direct.

2d. If, in the opinion of the court, your petitioner is not entitled to a rehearing of the argument on the merits, as prayed above, then it prays for a rehearing to the extent

that the opinion and judgment of the court may be modified, so that the dismissal of its bill may be without prejudice, and so petitioner will ever pray.

KNOXVILLE WATER COMPANY,
By SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR., *Attorneys.*

We hereby certify that this petition for rehearing is presented in good faith, and that we believe it is based on meritorious grounds.

SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR.,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

FIRST.

In support of the petition to rehear it is respectfully submitted:

1. The contract of July 1, 1882, is merely an agreement on the part of the city arising out of its business or proprietary powers, as distinguished from its governmental or legislative functions. By said contract the city neither granted a franchise nor parted with or diminished any of the powers necessary to accomplish the ends of its creation, but continued vested with absolute control over the price or cost of the commodity secured by said contract under the power of regulation expressly conferred upon it in the charter of the Water Company.

After a careful study of the opinion of the court we respectfully submit that the court has confused the subject-matter of said contract—its sole purpose—with the powers already granted to and vested in the Water Company, not by the city through and under said contract, but by the State through its charter prior to and independent of, though leading up to, said contract. Note the situation. The charter of the Water Company was granted on January 4, 1882, after consent of the city had been endorsed upon its application (Rec., p. 31), and immediately the Water Company was created into a corporation and vested not only with the usual and ordinary powers necessary to the operation of a water plant, but specially vested with the right or franchise to enter upon and occupy all of the streets, lanes, and public

thoroughfares of the city. It was also clothed with power to make any and all contracts with the city or its inhabitants covering a supply of water to them (Rec., p. 29).

How was it with the city? As shown in our original brief (pp. 24 to 27, 68 to 70), and as specifically averred in the bill (Rec., p. 4), the city was clothed with power and authority to provide a supply of water for itself and its inhabitants.

Thus, while both parties had the right to contract with each other, and the city might by contract secure a supply of water from the Knoxville Water Co. or refuse to do so, as to it seemed best, it could not prevent the Water Company from entering upon its streets and public thoroughfares for the purpose of establishing and maintaining a water plant, because such power was expressly conferred upon the Water Company by its charter. Therefore there was no grant by said contract of any franchise to the Water Company in the sense of a grant of public property or governmental or legislative functions.

The contract may be boiled down to this: An obligation upon the part of the Water Company to furnish for a period of thirty years all the water which the city might require for itself or its inhabitants, and a correlative obligation upon the part of the city to take such water in order to enable the Water Company to fulfill its covenants and undertakings.

Such contract, as substantially held by the court of appeals for the sixth circuit, speaking through Judge Taft, and passing upon a similar question between a Tennessee corporation and a municipality of the same State, arose out of the business powers of the city as distinguished from its governmental or legislative functions. That the distinction

between such powers and functions and the rules of interpretation applicable thereto is well marked—that is, contracts entered into under and within the business powers of a corporation—should receive the same treatment and be subjected to the same rules of interpretation as contracts between private corporations or individuals (Cunningham *vs.* Cleveland (C. C. A.), 98 Fed. Rep., 663; Illinois Trust & Savings Bank *vs.* Arkansas City (C. C. A.), 76 Fed. Rep., 271; Western Savings Fund Association *vs.* Philadelphia, 31 Pa. St., 175).

We respectfully insist that it is well settled by the decisions of this court and the weight of authority in other jurisdictions that when a municipal corporation makes a contract within the scope of its just powers—which is not against public policy and not fraudulent—it must be construed and enforced as the contract of a business corporation or person. Such was practically the language of the supreme court of Indiana in the case of The City of Indianapolis *vs.* Indianapolis Gas Light & Coke Co., 66 Ind., 407.

Full effect was given to this principle by this court in the case of Hall *vs.* Wisconsin, 103 U. S., 5, 10, 11, wherein it was held that a contract between a State and an individual, whereby the latter is to perform certain services for a specific period at a stipulated compensation, is within the protection of the Constitution, and even a repeal of the acts pursuant to which the contract was made before the expiration of the term cannot deprive him of his compensation for the full period. In *Davis vs. Gray,* 16 *Wall.,* 203, 232, involving the construction of a grant to a large tract of the public domain, this court said:

"When a State descends from the plane of its sovereignty "and contract with a private person, it is regarded pro hac "vice as a private person itself and is treated accordingly."

Therefore we submit that in construing the force and effect to be given to the contract of July 1, 1882, it should be treated not as merely conferring a license or franchise to do business or granting away powers, diminishing the usefulness or destroying the purposes for which the municipality was created, but as an ordinary agreement for the benefit of the municipality and its citizens, whereby was secured a commodity no more necessary for fire protection and sanitary purposes than would be fuel for its fire-engines or piping for its sewers. The question of whether the parties would trade—that is, one would sell and the other would buy—was a mere matter of agreement entered into within the just powers of both parties, and we submit that no rule of construction should apply different from that applying to any valid and enforceable contract covering a like subject-matter between private corporations or individuals.

2. In further support of the proposition relied on in the first paragraph of the petition for rehearing we respectfully submit that the rule of construction applied and enforced, in the opinion of this court, is applicable alone to grants of public property or of those governmental functions and powers, which, as stated by this court in the Charles River Bridge case (11 Pet., 420), must not be diminished so as to defeat the accomplishment of the ends for which government is created; and we fail to remember a case decided either by this court or any other where it was applied save to cases wherein it was sought to *imply a contract* from a mere license

or grant to carry on a particular business or to similar cases. In so far as our researches go, it has never been applied so as to defeat the purpose and object of a valid contract entered into within the powers of the parties thereto.

To illustrate our meaning, it is only necessary for us to analyze the holding of this court and the matters to which it was applicable in the Charles River Bridge case, *supra*, which by all the cases is cited as the fountain and source of that particular canon of construction enforced against appellant in this case. In that case it was contended on behalf of the Charles River Bridge Co. that its charter was a contract giving it exclusive right to build a bridge across the Charles river, which was impaired by a subsequent grant to the Warren Bridge Co., authorizing it to erect a bridge across the same river. Prior to the grant to the Charles River Bridge Co.—that is, in 1650—Harvard college had been granted ferry rights across said river, and in the charter of the Charles River Co. it was made obligatory upon that company to pay to Harvard college £200 annually *out of the tolls* received from said bridge. In addition to its own charter, the Charles River Company sought and set up a claim to an exclusive franchise through the grant to Harvard college; but after an exhaustive argument by some of the greatest lawyers and ablest jurists that this country has produced, this court held:

1st. That the ferry rights granted to Harvard college in 1650 were extinguished by the building of the Charles River bridge and the compensation of £200 per annum provided to be paid and accepted by said college *out of the tolls* received from said bridge.

2d. The act incorporating the Charles River Bridge Co. conferred only the privileges such as are commonly given to corporations of that kind—that is, provisions authorizing it to build a bridge and to establish certain rates of toll. This was the whole grant. No exclusive right over the waters of the river was given—no right to erect another bridge or prevent others from doing so was conferred, nor was there any promise or engagement upon the part of the State that other bridges should not be erected.

3d. Upon these facts the court refused to *imply a contract* or infer one from the mere grant of franchises contained in this ordinary act of incorporation, and we respectfully submit that every case cited in the opinion of the court involves facts either similar to the Charles River Bridge case, where no contract was executed, and the court refused to imply one from a mere grant to do business, or where the contract had expired by limitation or had been made subject to the authority of the State to revoke the same.

In Turnpike *vs.* Illinois (96 U. S., 63–68) the general principle announced in the Charles River Bridge case was approved, but another well-settled rule was equally controlling in the determination reached by this court. In this case the original grant limited the franchise to twenty-five years. In 1861, when the term of the charter had more than half expired, the State gave the company a new and additional privilege, the privilege of using a certain public bridge and dike and of erecting a toll-gate thereon. Said the court:

"The only consideration required was that the company should keep them in repair, but should not even be responsible for any destruction of the dike by flood."

Here the absence of an agreement to *maintain* the dike was specially noticed by the court.

Further, "the consideration was continuous and correlative to the continued use. No term was expressed for the enjoyment of this privilege, and no conditions were imposed for resuming or revoking it on the part of the State. It cannot be presumed that it was intended for a perpetual grant, for the corporation itself had but a limited period of existence."

"By analogy to the rule of the common law, that a grant to a natural person, without words of inheritance, creates only an estate for his life, a grant, without words of perpetuity, to a corporation aggregate, whose duration is limited, creates only an estate for its life."

Thereupon it was held that the use of the bridge and dike terminated with the corporate existence of the corporation.

In Oregon Railway & Navigation Co. *vs.* Oregonian Railway Co., Limited (130 U. S., 126), the rule was applied not to the construction of a contract, but to the charter or articles of incorporation upon which the very existence of the corporation depended.

In Coosaw Mining Co. *vs.* South Carolina (144 U. S., 550, 561–2) the quotation from the opinion was applied to the construction of a grant of public property which was fairly susceptible of two different meanings or interpretations.

In Slidell *vs.* Grandjean (111 U. S., 412, 438) the principle enforced in the opinion was applied not to a contract in any way similar to the one involved at bar, but to a grant of a large part of the public domain practically without consideration.

So in Hamilton Gas Light Co. *vs.* Hamilton City (145 U. S., 258), while the principle was recognized, it was not applied to a valid, existing, and enforceable contract, and this court so only decided:

1. That the contract between the city and the Gas Light Company had expired before the city undertook to build its own plant.

2. That whatever may have been the exclusive character of the original grant to the Gas Company, nevertheless that grant was subject to the provisions of the constitution of Ohio relating to the amendment or repeal of charters of incorporation, and that such constitutional right had been exercised through a proper legislative enactment, by which the exclusive character of the grant was repealed. It is to be noted that there is no claim in this case, nor could such a claim be made, that the charter of the Water Company has been in any manner repealed or amended. Under the constitution of Tennessee that could only be done by statute.

The Stein case (141 U. S., 67–81) is only authority for the proposition that the right to take water from one particular source is not exclusive of other and different sources.

In the Joplin case (191 U. S., 150–156) it is specifically stated that the Light Company made no claim to an exclusive franchise; but its contention was that a contract was to be implied from the mere grant of a right to do business during a certain period. Confessedly, said contention was properly overruled.

We confess that we are wholly unable to find anything in the Helena case (195 U. S., 383) which militates against the contention made here on behalf of appellant. In that case

the period during which the Water Company had obligated itself to furnish water to the city was limited to a term of five years, and had expired before the city set about building its own works; and in addition to this the ordinance upon which the Water Company based its claim to an exclusive privilege contained an express provision declaring that the grant by the city to the Water Company should not be exclusive of the right of the city to contract with another company, so that the contention of the city had for its narrow support merely the grant of a franchise or right to carry on its business in the city.

At the risk of repetition, we respectfully but earnestly invoke the attention of your honors to the opinion of the circuit court of appeals, ninth circuit, when the Helena case was before it, and whose judgment was affirmed by this court (City of Helena *vs.* Helena Water Works Co., 122 Fed. Rep., 13).

Therefore, after most careful consideration of this whole question, we feel constrained to respectfully but earnestly submit that this contract which is entered into between these two parties, and which upon the averment of bill must be held to have been and to be for the public good, when viewed from the situation of the parties and in the light of the surrounding circumstances, meets every objection or ground upon which this court has hitherto repelled any individual or corporation claiming an exclusive right, privilege, or franchise.

SECOND.

But without regard to whether the principle applied and enforced by the majority of the court as set out in the opinion is applicable to the contract involved in this case, nevertheless we confidently submit that, even judged by that strict rule of construction, the court should have determined that the city had thereby precluded itself from obtaining a supply of water for itself and its inhabitants from any other source save the Knoxville Water Company during a period of thirty years, unless within that time the city exercised its reserved right to purchase the plant and property of appellant, and thus put an end to its obligation to further use or take water from appellant.

We cannot suppose that the court by its opinion and the language therein used intended to extend the principle of strict construction beyond a case where a grant or ordinance or contract was susceptible of two or more constructions, in which event that construction most favorable to the public would be adopted. We do not understand that by the use of the term "Nothing passes by mere implication" the court intended to say more than that doubts will be resolved in favor of the public, or that there must be something more than a bare implication or inference upon which to predicate a claim to an inviolable grant either of property or franchise. Certainly the court could not have meant that nothing will pass by implication, however strong and inevitable such implication may be, because it is well settled that a municipal corporation possesses not only those powers expressly granted, *but such as are necessarily or fairly implied in or incident to the purposes granted,* and that where there

is any fair doubt concerning the existence of power such doubt is to be resolved against the corporation. Nevertheless it is equally well settled that the fundamental and universal rule, which is as reasonable as it is necessary, is that the construction to be placed upon a legislative grant is to be just, seeking first of all for the legislative intent in order to give it fair effect.

Dill. Mun. Corp. (4th Ed.), secs. 89, 91.

In Tennessee, and it must be borne in mind that the rights, powers, and obligations of Tennessee corporations are here involved, the rule is thus stated:

"A corporation exists alone by virtue of its act of incorporation and it can exercise no powers but such as are the result of necessary or proper implication. The powers of a corporation being exercised, then, under delegated authority, are to be strictly construed. * * * *But this construction has never confined the execution of the power to the word and letter, but everything necessary and proper for carrying into execution the granted powers has always been conceded by the strictest constructionists.*"

Nichol *vs.* Nashville, 9 Humph., 261–2.

City of Memphis *vs.* Memphis Gayoso Gas Co., 9 Heisk., 530, 537, 538.

Further, this court in Hudson Canal Co. *vs.* Penna. Coal Co., 8th Wall., 288, in effect said that necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed.

It is further well settled that the law implies duties and obligations in a contract other than those which are expressed, or, to state it differently, what is implied in a statute,

pleading, or contract is as much a part of it as what is expressed.

U. S. *vs.* Babbit, 1 Black, 55.
Donahue *vs.* Kittell, 1 Cliff., 144.
Mass. *vs.* R. I., 12 Peters, 123.
Union Depot Co. *vs.* Chicago Ry. Co., 193 Mo., 213.
Parsons on Contracts (9th Ed.), vol. 2, p. 670.

Further, we submit that in determining the meaning of a contract courts cannot be blind to the situation of the parties and what has been done by both parties under the contract, but must acquaint themselves with the situation of the persons and the circumstances surrounding them, and, thus placing themselves in the situation of the parties, view the circumstances in the light of the surroundings, so as to judge of the meaning of the words and of the correct application of the language to the thing described.

Goddard *vs.* Foster, 11 Wall., 123, 143.
Guarantee Co. *vs.* Trust Co. (C. C. A.), 80 Fed, 766, 778.

The situation of the parties in 1882 and immediately preceding, and at the time of the execution of the contract of July 1, 1882, may upon the averments in the bill be best shown as though the following conversation had taken place between them leading up to and resulting in the execution of a contract:

The Water Company.—We have just been granted a charter of incorporation by the State, authorizing us to carry on the business of a water company in the City of Knoxville, and to that end empowering us to enter upon and

use the streets and public thoroughfares of the city, but if we should avail ourselves of the powers thus granted us and you (the city) should continue and complete the building of a plant to furnish yourselves and inhabitants with water, we would perhaps have no customers. Do you think it for your best interests to carry out your present plan?

The City.—It is true that a supply of water for municipal and private purposes is necessary both for the public and general good, and for that reason we have for some time been engaged in making plans and acquiring property for the purpose of erecting a plant, which we have just commenced, but there may be some doubt about the wisdom of this undertaking, in view of existing conditions. Therefore we might be induced to give over and abandon our plans and not complete the plant under construction, provided satisfactory terms can be made either with you (the Knoxville Water Company) or some other corporation or individual, by which a sufficient plant shall be erected which may become ours if hereafter we determine that we would like to end the taking of our supply from you, and which we may do by taking over and acquiring your property at its fair valuation. We shall advertise for bids, and we are ready to deal with that company or individual who, upon terms most favorable to us, will build our plant, and in doing so take, use, and pay for the property which we have acquired for that purpose, and keep and maintain it in a position to supply all public, municipal, and general private purposes, until such time as we desire to take over the plant for ourselves, and in the meantime, in order to prevent its acquisition by any other party, our right to purchase must be expressly stipulated, as well as a refusal to sell the plant and property to any one else.

The Water Company.—The terms you propose are satisfactory to us. We will build a plant for the City of Knoxville of capacity sufficient to supply all of its needs.

Thereupon they proceeded to set down what each desired. First they entitled their contract, *Articles of Agreement for the Construction of Water Works for the City of Knoxville.* Then the Water Company was required to agree to erect and establish a system of water works upon the property theretofore acquired by the city for that purpose and in accordance with plans and specifications prepared by or for the city, of capacity sufficient to supply the city with water for fire protection and for public, sanitary, and domestic purposes, and to have this plant completed within twelve months. Not content with this, the city says: You must also agree not only to erect a designated number of fire-hydrants, but also to erect from time to time as many additional hydrants as the necessity of the city may require. And still, not content with this, required the company to obligate itself to maintain its plant in such condition as would be sufficient and necessary to enable it to comply with all of its undertakings for a full period of thirty years, unless within that time the city should terminate the contract by the purchase of said plant, which was at all times the *prime and controlling idea of the city dominating every and all other provisions.*

Now, what is the necessary, the inevitable effect of these provisions? It is well settled that although a contract may in terms bind but one party, yet the law will imply corresponding and correlative obligations when it is necessary to carry out the intent of the parties and prevent the contract from being ineffectual.

Or, as in the case of Manistee Iron Works Co. *vs.* Shores

Lumber Co., 92 Wis., 21, which was predicated upon the language of Mr. Justice Clifford in D. & H. Canal Co. *vs.* Penn. Coal Co., 8 Wall., 289, the rule may be stated as follows:

"It is a well-known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it; that, where a contract is so framed that it binds the party contracting to do the act, it will imply a correlative obligation on the other party to do what is necessary on his part to enable the party so contracting to fulfill his part of the contract."

In Churchwood *vs.* Regina, L. R., 1 Q. B., 173, 198, Chief Justice Cockburn said:

"If a man engaged to work and render service which necessitates great outlay of money, time and trouble, and he is only to be paid by the measure of the work performed, the contract necessarily presupposes and implies on the part of the person who engages him an obligation to supply the work; so when there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible the party bestowing his service could claim remuneration."

This doctrine was approved by Mr. Justice Clifford in D. & H. Canal Co. *vs.* Penna. Coal Co., 8 Wall., 289, where, among other things, he said:

"Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed."

Now, applying these principles to this contract, what do we find? An express obligation upon the part of the Water

Company to build a plant sufficient to furnish, and to furnish, all of the water needed by the city and its inhabitants for all purposes for a full period of thirty years, and to maintain said plant so as to be able to comply with and fulfill said obligation.

Even if we could disregard or close our eyes to the situation of the parties at the time and to the fact that to all the intents and purposes this plant was built for the city itself, we could not by any refinement of construction escape the inevitable conclusion that during the period which the Water Company was required to furnish water to the city and its inhabitants and to keep up this plant so as to respond to every municipal or general private demand, that without regard to the nature of its franchise or the terms applicable to this particular thing, yet this could mean nothing else but that the city must during this period take and use the water of appellant so as to enable it to fulfill and comply with its obligations.

Let us illustrate this. It is plainly provided (Rec., pp. 34, 35) that the Water Company must so extend its pipes and mains that it may be in a position to erect as many fire-hydrants as the necessity of the city may require. How unjust and, we may be pardoned for submitting, what folly it would have been for the parties to even dream that the Water Company should be required to lay down pipes necessary to support some 600 or 700 hydrants, when the city would only take a third of that number. Yet this is exactly the present situation. The city has only required the Water Company to erect 250 hydrants. The pipes and mains of the Water Company are sufficient to support all the hydrants which the necessities of the city may require (Rec., p. 21).

Nevertheless, the city, disregarding this provision of the contract, is making arrangement to erect in addition to the 250 now in use by it 575 additional hydrants upon pipes and mains built for itself. The fact that it is going to erect this number of hydrants may be *prima facie* evidence that they are necessary, but certainly the city, in view of the plain requirements of the contract, ought not to be permitted to compel the Water Company to maintain miles of pipes and mains sufficient to supply 575 hydrants without having the income therefrom. The Water Company has the pipes and mains necessary and sufficient to support these hydrants. Upon the plainest principles of justice and equity it is entitled to this revenue, and the city should not be permitted to act in competition with and tax and destroy the plant and property of the Water Company, when it is complying in the fullest sense with both the letter and spirit of its contract.

Further, we respectfully submit that the majority of the court in discussing only that provision of the contract whereby the city covenanted not to grant to any other person or corporation the right or privilege of supplying itself with water, and apparently ignoring the other provisions hereinbefore referred to, seems to have been of the opinion that the right of the Water Company to continue supplying water to the city and its inhabitants as their sole and only supply depends solely upon that particular covenant upon the part of the city. We respectfully submit that such is not the case. It can only be useful as rounding out and finishing off a contract, whose exclusive character must break out upon even the most casual reader thereof. That provision, we submit, was as much in the interest of the city as the Water Company and after the other provisions had been placed in the con-

tract, the Water Company doubtless said something like this to the city:

Now it is true that you are to take from us all the water required by you until you become ready to buy our plant; now there is nothing in this which inhibits your giving consent to the State's granting another charter, authorizing some other corporation to enter this territory and build a plant. True, competition from a private company may not be greatly feared; nevertheless, it would be embarrassing, not only to us, but to you when you come to own this plant under your reserved right of purchase. Therefore, let us put this matter beyond question by a stipulation to the effect that you will not give any other person or corporation the right to furnish either yourself or the inhabitants of the city with water.

That was done; that rounded out the contract. We submit that unless it shall be held by this court that in order to protect a water company in a sole right to supply a city and its inhabitants with water it is necessary to expressly stipulate that such right is exclusive; that it would be impossible to frame a contract in stronger language containing more inevitable implications as to the exclusive nature of the contract than are to be found in the one under consideration. In other words, unless the doctrine of strict construction is to be extended to the extent that a certain formula of words or terms is necessary to be used in order to denote an exclusive and sole right, the contract under consideration should be sustained, protected and preserved even under the principles recognized and enforced against us in the majority opinion of this court.

THIRD.

We shall next consider the third and fourth paragraphs of the petition to rehear together. Under these heads we respectfully submit:

1. That the court should have treated the contract of July 1, 1882, as a valid continuing agreement made by the city in virtue of its business powers, whereby, for the public good, it acquires for itself during a limited period a certain and sufficent supply of water for all public and private purposes.

2. That the city, without regard to the exclusive character of the contract, should be required to do all that is necessary upon its part to enable the Water Company to comply with and fulfill its contractual obligations—that is, the Water Company being required to procure and maintain a sufficient supply of water for all public purposes and private needs, the city should be compelled to take such water, and do nothing which would disable and cripple the Water Company in the performance of its obligations. To do this would be merely to compel the city, as stated by this court in the Walla Walla case, to have a decent regard for its contracts. And here again we call the attention of the court to the Walla Walla case (172 U. S., 1), wherein this court effectually prevented from impairment a contract which was not and could not be exclusive in its character. The city of Walla Walla was expressly inhibited from making an exclusive contract, and this court treated said contract as not being exclusive. Otherwise, it might have been objectionable upon the ground that it

was a monopoly, and therefore void, under the laws of the State of Washington.

We can add nothing to the reasoning and language of this court in the Walla Walla case, which has been repeatedly recognized and approved in subsequent decisions. We are either entitled to restrain in advance this effort to confiscate the plant and property of the Water Company upon the authority of the Walla Walla case, or upon the authority of the case of the Red River Bridge Co. *vs.* Mayor and Aldermen of Clarksville (1 Sneed, Tenn., 176), we are entitled to compensation from this defendant for the destruction of our property, which will inevitably follow the building of a competing plant by the City of Knoxville.

The questions involved in the Red River Bridge Co. case are fully set out in the statement of facts and opinion of the court, which we here take the liberty to quote in full:

"In 1829, the legislature granted to the plaintiffs, The Red River Bridge Co., the right to erect a bridge across Red river at the town of Clarksville, with the usual power to exact tolls of persons crossing the bridge, and stipulated in the charter that no other *toll* bridge should be at any time erected within one-half mile of plaintiffs' bridge. The plaintiffs erected their bridge at the place designated in their charter, and continued to exact tolls of persons crossing it, until the commencement of this suit. In 1847, the legislature authorized the municipal authorities of the town of Clarksville to purchase the plaintiffs' bridge or to erect a *free* bridge near to the same. The corporation (City of Clarksville) commenced building their bridge within a few feet of the plaintiffs' bridge; whereupon, it filed this bill in chancery at Clarksville, praying an injunction against the erection of said free bridge, and asking compensation for the damage sustained thereby. The chancellor dismissed the bill, and complainants appealed to this court."

The foregoing is a full statement of the case, as set out in the official report. The opinion of the court by McKinney, chief justice, is as follows:

"In view of all the facts of this particular case, we think the complainant is entitled to compensation, as prayed in the bill. *Whether or not the charter granted to the complainant contains the exclusive right alleged in the bill, and admitted in the answer, does not certainly appear, nor is it important to inquire how the fact is, with a view to the decision of the present case.* For, assuming that it is, still we think it clear that such exclusive right must yield to the public interest. And, admitting that the grant is a contract, and that it is inviolable, yet to hold that the property or franchises acquired under it may be taken for public use, 'upon just compensation being made therefor,' is not to impair the contract in the sense of the Constitution.

"The proof in this record establishes that the bridge of the complainant was amply sufficient for the accommodation of the public, and that the sole and avowed object of the erection of a free bridge, within a few feet of the former, was to divert the whole travel from it, and thereby destroy its value, under the belief that the inducements held out to the public by a free bridge would greatly promote the local interests of the town of Clarksville.

"It is manifest that the erection of a free bridge, under the circumstances of the case, amounts to a total destruction of the franchise granted to the complainant in principle and effect. The site and structure of the old bridge might as well have been taken and appropriated to the use of the new one; and while we concede that this might be done, and likewise concede that the grant to the defendant must be sufficient evidence that the public interest required that it should be done; yet, we hold that it could only be done upon the condition of making just compensation to the complainant for the franchises thus destroyed. It follows, therefore, that the

defendant must account for the reasonable value of complainant's bridge at the time of the completion of the free bridge. The decree will be reversed and an account ordered."

It will be noted, first, that in the grant to the Red River Bridge Co. the State only stipulated that it would not grant a charter to any other *toll* bridge within one-half mile of the Red River bridge. Upon principles of construction contended for and generally admitted in grants of this character, this sort of stipulation would not exclude the right to grant a charter to a free bridge. It is also manifest that the court, notwithstanding the pleadings, took this view of it, and declined to adjudicate that the Red River Bridge Co. was vested with an exclusive franchise, but held, in effect, that it was immaterial whether or not the franchise was exclusive; nevertheless, the Red River Bridge Co. was entitled to compensation for its property thus destroyed, when it could have been secured upon a reasonable and fair valuation, either by negotiation between the parties or by condemnation.

In the contract at bar, even if its necessarily exclusive features should be eliminated, there were means provided for taking over or purchase or condemnation—by whatever term it may be called—of the property of the Water Company at a fair valuation. This being so, and the bill (Rec., p. 21) plainly and positively averring that this property was built not only upon the faith of appellant's exclusive right to furnish water to the city, also with the distinct understanding that if the city within the period of the contract should desire to own and operate a water plant it would acquire the plant and property of appellant, it should either be restrained from building a competing plant, or compelled to purchase the plant and property of appellant, or to account for the reason-

able value of the property which it has thus destroyed. It is true there is no specific prayer in the bill to this effect—that is, asking for compensation for the value of the property—but a court of equity may grant under the prayer for general relief any relief other and different from that specifically indicated and prayed, which is justified by the averments of the bill (Story, Equity Plead., sec. 40; Dodd *vs.* Benthal, 4 Heiskel, 608; O'Connor *vs.* Knoxville Hotel Association, 93 Tenn., 108-110).

FOURTH.

If the court should be of the opinion that appellant is not entitled to the relief sought by it in the courts of the United States, then we respectfully but earnestly submit that the dismissal of its bill and affirmance of the judgment of the court below should be without prejudice to the end that the holders of its bonds, acquired long prior to the institution of this suit and purchased upon the implicit faith in the exclusive character of the contract of July 1, 1882, and relying (p. 21) upon the "distinct understanding that the city," if it desired to operate its own water plant within the contract period, "would acquire the plant and property of the Water Company under the terms and in the manner provided in said contract," may not be embarrassed in whatever proceedings they may be advised may be necessary to protect their property, and especially to receive in the courts of the State of Tennessee the benefit of the rule requiring compensation for property taken or destroyed by a municipality as laid down and enforced by the supreme court of Tennessee in the

case of Red River Bridge Company *vs.* Clarksville, 1 Sneed, 176.

We submit that it must be plain to your honors that petitioner has not "merely speculated" with the Federal courts in this its endeavor to prevent appellee city from violating its contract and building its own plant.

We submit that petitioner had good grounds to believe:

1. Not only that its contract supplied every element, the lack of which had caused this court to refuse relief to corporations claiming a sole or exclusive privilege, but also that it could not be distinguished from the Walla Walla case (172 U. S., 1), and was on all fours with the reasoning of the courts of appeals of the sixth and ninth circuits in the Cleveland case (98 Fed. Rep., 666), and the Helena case (122 Fed. Rep., 13).

2. *That this court would follow that construction of the contract of July 1, 1882, adopted by it in suit between petitioner and appellee city, wherein it was held in an unanimous opinion (189 U. S., 434) that exclusive privileges for thirty years" were conferred upon petitioner by said contract.*

That this is no mere afterthought or grasping after straws by a defeated litigant is shown by the averments of the bill (Rec., p. 12), which set out, plead, and rely upon the holding of this court in said case of The Knoxville Water Company *vs.* The City of Knoxville (189 U. S., 434) as settling the contention here made on behalf of petitioner in its favor.

If petitioner has been mistaken, we submit that its mistake, caused by the reasons set out, should not prejudice the trustee in mortgages or holders of bonds thereunder, executed long

prior to the institution of this suit and which provided the hundreds of thousands of dollars invested in this plant for the benefit of the city and its inhabitants, from taking such steps as they may be entitled to protect the large interests involved and now threatened with absolute destruction.

Respectfully submitted,

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R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR.,
Solicitors for Petitioner.